

FIVE TO FOUR CONSTITUTIONAL LAW DECISIONS

The United States Constitution like all other written constitutions is confined to the fundamentals. Chief Justice Marshall in one of his decisions said: "A constitution, from its nature, deals in generals, not in details. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles."¹

The work of filling in the details left open by the United States constitution has been partly accomplished by the action of congress in enacting the large body of federal statutes, but this work has been done to a probably equal degree by the federal courts in their interpretation of the various clauses of the constitution. The latter work has been, in a way, of a higher order than the former. The acts of congress are but "statutory law," while, since the authoritative interpretation put upon written law, either constitutional or statutory, by the courts, becomes, as it were, a part of the written law which interpretates, the decisions of our courts interpreting the United States constitution, becomes a part of our constitutional law. No amount of study of the text of the United States constitution can bring to the lawyer any satisfactory knowledge of constitutional law, unless the study of the text is supplemented by the study of the judicial decisions interpreting the same.

The authoritative interpreter of the United States constitution is the United States supreme court. When this court has once passed upon a question arising under the federal constitution this question is settled and all departments and officers of the national government, all state governments, and all citizens of the United States are bound thereby.

It is very generally understood that the final decision as to the meaning of any clause of the United States constitution or as to the constitutionality (under the United States constitution) of any federal or state statute rests with the nine justices of the United States supreme court. What is not so generally appreciated, however, is how often during the past half century such decision has rested upon the decision of a single justice.

¹ *United States Bank v. Deveaux*, 5 Cranch 87.

It is a startling statement, but nevertheless an absolutely correct one, that the large majority of the most important constitutional law questions which have come before the United States supreme court since the beginning of the Civil War have been decided by a majority of one in the vote of the justices of the United States supreme court. In a dozen or more cases the change of the vote of one justice would have changed permanently in some important respect, the construction given to the constitution, and in some of these cases such a change would have had a far-reaching effect upon the future history of the United States. It is the purpose of this article to simply call attention to the most important of the recent "five to four" decisions of the United States supreme court upon questions of constitutional law.

We begin with the *Prize Cases*² which passed upon the legality of the capture of the brig Amy Warwick, the schooners Crenshaw and Brillante, and bark Hiawatha, and in which mixed questions of international and constitutional law were involved. While the former element predominated there was a sufficient element of the latter to justify the inclusion of this case in this article. The decision in all four of the *Prize Cases* depended upon the answer to two questions, stated by the supreme court in their decision as follows:

"First—Had the President the right to institute a blockade of ports in possession of persons in armed rebellion against the government, on the principles of international law, as known and acknowledged among civilized States? Second—Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as 'enemies' property?"

Or differently stated, the question was whether the United States government had the right to refuse to recognize the Confederate States as having the rights of belligerents, and at the same time employ against the portions of the United States which were in actual rebellion all those methods of warfare which it could have exerted against the territories of any foreign country with which the United States might have been at war.

By a vote of five to four the supreme court of the United States decided both of these cases in favor of the government, and upheld the legality of the capture of the four ships. The

² 2 Black 635.

importance of the decision in the *Prize Cases* is apt to be underestimated. If the supreme court had declared the seizures of these ships to have been illegal, it would have also decided that this country had illegally seized many ships belonging to citizens of England and France. Such a decision at that time would have most seriously affected the relations between the United States and France and England, and would have embarrassed the conduct of the war, and might have caused its ultimate failure. That a decision adverse to the government had been a dangerous probability is shown by the fact that the four judges who dissented from the decision had constituted a majority of the court as it was composed before the appointment of two new justices of the court which had taken place very shortly before this decision was rendered.

The question of the power of congress to make United States treasury notes, colloquially known as "greenbacks," a legal tender in payment of preëxisting debts, was one which proved to be so particularly troublesome to our supreme court, that before they finally disposed of the problem they decided it three different ways. It is not surprising therefore, that two of these decisions were rendered by a bare majority of the court.

*Hepburn v. Griswold*³ was strictly speaking a "four to three" decision instead of a "five to four" one, there being two vacancies in the membership of the supreme court at the time the decision was rendered. In the decision in this case the act making treasury notes legal tender was held to be unconstitutional in so far as it applied to the payment of debts which antedated the passage of the act. Justices Miller, Swayne, and Davis dissented.

The two vacancies on the supreme court were filled upon the 7th of February, 1870, the same day upon which the decision of the court in *Hepburn v. Griswold* was rendered. This same question as to the constitutionality of the Legal Tender Acts came up again before the supreme court, with its increased membership the following year in the cases of *Knox v. Lee* and *Parker v. Davis*.⁴ The result of these cases was a reversal of the decision in *Hepburn v. Griswold* and a decision in favor of the constitutionality of the Legal Tender Acts, such decisions being based mainly on the ground of expediency and public necessity, and upheld as a proper and necessary war measure.

³ 8 Wall. 603.

⁴ 12 Wall. 457.

Chief Justice Chase and Justices Clifford, Field and Nelson dissented from the decision in these cases. The justices included in the "five" who constituted the majority were the three justices who dissented in *Hepburn v. Griswold* and the two new justices appointed on Feb. 7, 1870. The third of the legal tender decisions, that in *Julliard v. Greenman*,⁵ was not a "five to four" decision and therefore falls without the scope of this article.

The first important decision by the supreme court of the United States relative to the meaning and application of the fourteenth amendment to the United States constitution, was that rendered in the *Slaughter House Cases*.⁶ These cases involved the constitutionality of an act of the legislature of Louisiana entitled "An Act to protect the health of the city of New Orleans, to locate the stocklandings and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company" which prohibited the landing or slaughtering of animals whose flesh was intended for food, within the city of New Orleans and other parishes and boundaries named and defined, or the keeping or establishing any slaughter-house or abattoirs within these limits, except by the corporation thereby created, and which made it the duty of said company to permit any person to slaughter animals in their slaughter-houses under a heavy penalty for each refusal. The statute was alleged to be a violation of the constitution of the United States (*i. e.*, of the thirteenth and fourteenth amendments) in the four following particulars:

- (1) That it created an involuntary servitude forbidden by the thirteenth amendment;
- (2) That it abridged the privileges and immunities of citizens of the United States.
- (3) That it denied to the plaintiffs in the case the equal protection of the laws;
- (4) That it deprived them of their property without due process of law.

By a "five to four" vote the court sustained the constitutionality of the Louisiana statute, on all points. The dissenting members of the court, in these cases, were Chief Justice Chase, and Justices Field, Bradley and Swayne, all of whom, except the Chief Justice, prepared individual dissenting opinions.

⁵ 110 U. S. 421.

⁶ 16 Wall. 36.

In 1895 the constitutionality of the income tax provisions of the Tariff Act of August 15, 1894, was twice argued before the United States supreme court. On April 8, 1895, the court, one justice being absent, decided in the cases of *Pollock v. Farmers Loan and Trust Company* and *Hyde v. Continental Trust Company*,⁷ that:

"A tax on the rates or income of real estate is a direct tax within the meaning of the term as used in the constitution of the United States.

"A tax upon income derived from the interest of bonds issued by a municipal corporation is a tax upon the power of the state and its instrumentalities to borrow money and is repugnant to the constitution of the United States. Upon each of the other questions argued at bar, to-wit:

"1. Whether the void provision as to rent and income invalidates the whole act? 2. Whether as to the income from personal property as such, the act is unconstitutional, as laying direct taxes? 3. Whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on either of the grounds suggested? The justices who heard the argument were equally divided, and, therefore, no opinion is expressed

Upon a second hearing⁸ held before a full court, the entire law on May 20, 1895, was declared unconstitutional by a "five to four" vote. There was one feature with relation to the vote of the justices on the second hearing of the case which calls for particular mention. Justice Brown, who had been absent at the first hearing, voted to sustain the constitutionality of the fact, but Justice Shiras, who at the first hearing had supported the constitutionality of the act, at the second hearing, six weeks later, reversed his own opinion and by voting against the constitutionality of the act made the necessary "fifth" vote to throw the victory to that side of the controversy. The dissenting justices in this case in addition to Justice Brown were Justices Harlan, Jackson and White.

*United States v. Trans-Missouri Freight Association*⁹ was a "five to four" interstate commerce decision, the substance of which was to the effect that an agreement in restraint of trade could not be upheld by proving that the restraint was reasonable.

⁷ 157 U. S. 586.

⁸ 158 U. S. 601.

⁹ 166 U. S. 290.

Justices White, Field, Gray and Shiras made up the dissenting quartette on this occasion.

The climax of dissenting opinions was reached in the so-called "*Insular Decisions*" which together fill the greater part of the 182nd volume. The combined decisions in the cases of *DeLima v. Bidwell*¹⁰ and *Downes v. Bidwell*¹¹ fix the status of the colonial possessions of the United States. Four justices dissented from the first of these two decisions, and four *different* justices from the other. Justice Brown was the only member of the court to vote with the majority in both cases. The status of Porto Rico and the Philippines may thus be said to have been determined not by the vote of five justices but by the vote of one.

The case of *De Lima v. Bidwell* was an action brought by De Lima against Bidwell, the collector of the port of New York, to recover back duties alleged to have been illegally exacted and paid under protest upon certain importations of sugar from San Juan in the Island of Porto Rico, during the autumn of 1899, and subsequent to the cession of the Island to the United States. The court held that the question as to whether these cargoes of sugar were subject to duty depended solely upon the question whether Porto Rico was a "foreign country" at the time that the sugar was shipped, since the Tariff Act of July 24, 1897, then in force, under which it was claimed that the duties were collectable, provided that, "there shall be levied, collected and paid upon all articles imported from foreign countries" certain duties.

Five justices constituting the majority said: "We are therefore of the opinion that at the time these duties were levied Porto Rico was not a foreign country within the meaning of the tariff laws but a territory of the United States, that the duties were illegally exacted, and that the plaintiffs are entitled to recover them back."

The dissenting justices were McKenna, Shiras, White and Gray.

The most important of the insular cases was that of *Downes v. Bidwell*. The direct question in this case was whether congress had the power to lay duties on articles imported into the colonies of the United States, or upon articles exported from the colonies of the United States to the United States. The ultimate question involved was whether the term United States included

¹⁰ 182 U. S. 1.

¹¹ 182 U. S. 244.

the territories and colonies of the United States. A majority of the court decided that congress had power to lay and collect such duties and that the term United States as used in the constitution only included the territory of the different States. The five judges holding this view differed widely from each other as to the reasons for it. Opinions were delivered by three of the judges of the majority—Mr. Justice Brown, Mr. Justice White, and Mr. Justice Gray. Mr. Justice McKenna and Mr. Justice Shiras concurred in the opinion of Mr. Justice White. Chief Justice Fuller and Justices Harlan, Brewer and Peckham dissented.

Another case decided the same day was that of *Dooley v. United States*,¹² which involved the right of the United States under the war power, after the signing of the treaty of peace to collect taxes of imports into Porto Rico from the United States. The majority of the court held that as the right to exact duties upon importations from Porto Rico to the United States ceased with the ratification of the treaty of peace, the correlative right to exact duties upon imports from the United States to Porto Rico also ceased at the same time. The same judges dissented from the opinion in this case as from that in *De Lima v. Bidwell*.

Although Justice Brown alone of all the nine justices of the court believed in the correctness of all the decisions in the "*Insular Cases*" it is probable that the views of Justice Brown were entirely correct and that the supreme court will never change the rulings laid down in these cases.

The question whether, when congress is prohibited generally from legislating on any particular subject or from doing any particular act (as is the case with the restrictions contained in the first eight amendments and part of those in the ninth section of the first article of the constitution) such restriction would act as a limitation of the power of congress over the territory belonging to the United States, as well as over the United States itself, is one which after having been the occasion of much discussion was finally passed upon by the supreme court in the year 1903, in the case of *Hawaii v. Mankichi*.¹³ This case involved the legality of the conviction of Osaki Mankichi, a murderer in Hawaii, who had not been indicted by a grand jury, and who had been convicted by a majority instead of by a unanimous vote of

¹² 182 U. S. 222.

¹³ 190 U. S. 197.

the trial jury, after the islands had been annexed to the United States, but before they were formally incorporated into a territory. The provision in the United States constitution requiring a trial by jury, is held to require the old common law method of trial jury, the unanimous verdict of a jury of twelve men. The Hawaiian law required no grand jury indictment, and permitted a majority of the trial jury to convict. The Newlands Resolution annexing the islands provided that: "The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the congress of the United States shall otherwise determine."

The question presented to the supreme court was whether the conviction by a majority of the jury, while Hawaiian laws still applied, was contrary to the American constitutional provisions. By a vote of five to four the court decided that the conviction by a majority of the jury was legal. This is a decision to the effect that the United States "Bill of Rights" is only in force in the United States itself, and does not apply to territory belonging to the United States.

The dissenting opinion in this case was rendered by Chief Justice Fuller with whom concurred Justices Harlan, Brewer and Peckham. In this case the effect of the vote of a single justice was to deprive millions of people of the protection secured by the constitutional right to a trial by jury.

Although *Dorr v. United States* was not nominally a five to four decision, it was one for all practical purposes. The question involved in this case was that of the right of a trial by jury in the Philippine Islands. Justice Harlan wrote a dissenting opinion which is entitled to a place among the ablest expositions of a constitutional law question ever rendered by any of the justices of the supreme court of the United States. No other justice formally dissented but the Chief Justice and Justices Peckham and Brewer placed on record the fact that they considered the decision rendered by the majority of the court to be an erroneous interpretation of the constitution, and that they only refrained from dissenting because they held that on account of the previous decision of the court in the case of *Hawaii v. Mankichi*, the doctrine of *stare decisis* should be applied in the determination of the case.

One more case relative to the civil rights of the residents in the colonies of the United States remains to be considered. This is the case of *Kepner v. United States*,¹⁴ decided in 1904. This case involved the subject of double jeopardy. Under the Spanish law in force in the Philippines the government as well as the accused had the right to appeal in criminal cases. Under the American military government of the islands this right was continued in force together with nearly all of the other Spanish rules of criminal procedure. The Act of Congress of July 1, 1902, "for the administration of the affairs of civil government in the Philippine Islands" provided: "No person for the same offense shall be twice put in jeopardy of punishment" and "That the Supreme Court and Courts of First Instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided . . . subject to the power of said government to change the practice and method of procedure." In common law countries an appeal by the prosecution has always been considered inconsistent with the provision against double jeopardy. The underlying question before the court in *Kepner v. United States* was whether the provision against double jeopardy was to be given the meaning which it has under the common law or that which it possesses in Spanish procedure. The court by a vote of five to four decided in favor of the former interpretation.

The dissenting justices were Justices Holmes, White, McKenna and Brown.

The correctness of the decisions in each of the three "one judge" decisions last referred to is very doubtful. The arguments against the first two of these decisions cannot be better stated than they are in the dissenting opinion of Justice Harlan in *Dorr v. United States*. In regard to the last of these decisions it may be argued that the right of appeal by the government in criminal cases, under common law procedure, is held to be double jeopardy, principally because a new trial means a trial before a new jury, occasioning an obvious double chance of conviction. This reason does not exist under the Spanish criminal procedure (still in operation in the Philippines in its essential provisions) where no jury is known, and where the whole proceedings from the arraignment to the review of the case by the supreme court constitutes one action, and consequently one jeopardy. This criticism of the decision in *Kepner v. United*

¹⁴ 195 U. S. 100.

States would only apply as long as it is held that islands are not entitled to jury trials.

We close our list of recent important constitutional law decisions of the United States supreme court with the case of *Northern Securities Company v. United States*.¹⁵ Although the majority of the many legal questions raised in this case were questions of statutory construction (relative to the true meaning of Anti-Trust Acts of July 2, 1890) there was a sufficient mixture of constitutional law problems involved to justify the insertion of this case under the heading of this article. It is impracticable here to give anything like a full statement of the questions involved, or the legal propositions laid down by the court in this case. Briefly it may be said that it was decided that the Northern Securities Company, which held more than nine-tenths of the stock of the Northern Pacific Railway and more than three-fourths of the stock of the Great Northern Railway (such stock having been received from the former holders of the stock of these railways in return for shares in the Northern Securities Company), was an illegal combination in restraint of interstate commerce under the prohibition and provisions of the Anti-Trust Act and that it was within the power of a United States circuit court in an action brought by the Attorney-General of the United States after the completion of the transfer of such stock to it, to enjoin the holding company from voting such stock and from exercising any control whatever over the acts and doings of the railroad companies, and also to enjoin the railroad companies from paying any dividends to the holding corporation on any of their stock held by it.

The dissenting justices in this case were the Chief Justice, and Justices Holmes, White and Peckham.

It is not difficult to suggest an explanation of the fact that upon so many of the questions of constitutional law which have been recently arising the justices of the supreme court of the United States have been found to be so nearly equally divided in opinion. The most fundamental of all the principles of constitutional or statutory construction is that a court in construing a clause of a constitution or a statute should endeavor to carry out the intention of the men who drafted and adopted the law. The application of this principle becomes difficult when a court is called upon to determine the true intention in the minds of

¹⁵ 193 U. S. 197.

the members of the federal constitutional convention, on a subject upon which they were notoriously unable to agree at all (*e. g.*, the legal tender question) or upon a subject which we may feel very confident never entered the thoughts of a single member of the convention (*e. g.*, the proper relation which our Asiatic colonies should bear to the United States). On constitutional questions of this character a "five to four" division of opinion among the justices of the supreme court is not surprising.

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